IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS SHARKEY	:	CIVIL ACTION
	:	
v.	:	
	:	
FEDERAL EXPRESS CORPORATION	:	NO. 98-CV-3351

M E M O R A N D U M

Giles, C.J. January ____, 2001

Thomas Sharkey ("Sharkey") has brought federal and state law claims against the Federal Express Corporation ("Federal Express") for alleged wrongful termination. Specifically, he raises federal claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., and state law claims under the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951, et seq. for disability discrimination and Pennsylvania common law for wrongful termination. Before the court is Federal Express' Motion for Summary Judgment as to all claims. For the reasons that follow, that motion is granted.

BACKGROUND

Taken in the light most favorable to the non-moving party, the undisputed facts are as follows: On May 16, 1988, Federal Express hired Sharkey as a courier/NON-DOT. His job was to drive a company truck to customer sites, and to pick up and deliver packages sent through Federal Express' service. Written job performance criteria required standing and walking for prolonged periods of time, lifting and carrying objects weighing up to seventy-five pounds,

manipulating up to one hundred-fifty pounds with assistance, and the general actions of bending, stooping, kneeling, squatting, twisting, turning, climbing, crawling, pushing, pulling, and overhead lifting. (Def.'s Mot. For Summ. J. Ex. B; Additional Docs. in Supp. of Summ. J. Ex. C, D.)

On January 3, 1997, while unloading packages from a delivery truck and placing them on a conveyor belt, Sharkey began to experience chest tightness, sweatiness, and shortness of breath. He had a history of such complaints related to underlying heart disease and stress caused by anxiety. Despite this history, he had an excellent exercise capacity as ascertained through numerous stress tests conducted by his physicians. (Pl.'s Exs. in Supp. of Mot. for Recons. Ex. E.) He took a nitroglycerin tablet and called his doctor. He was told to go to a hospital emergency room. He did, and was admitted to the hospital that day, although the chest discomfort had resolved by the time he arrived at the emergency room. During the first twenty-four hours of hospitalization, he experienced periodic elevations of certain enzymes that are important in monitoring the heart. Following the hospitalization, his treating physician, Dr. Thomas Santilli ("Dr. Santilli"), interpreted this enzyme elevation episode as evidence of a very tiny sub-endocardial myocardial infarction, which he related to a January 3, 1997 workplace event. (Id. Ex. G at 2.) During a subsequent workers' compensation proceeding, Dr. Robert Kleiman ("Dr. Kleiman"), a cardiologist, called in opposition to the claim, opined that there was no myocardial infarction. (Id. Ex. E. at 3). He opined that there had been a misinterpretation of cardiac enzyme levels and that the elevated levels observed were almost entirely due to skeletal muscle release of enzymes. (Id.) After five days of hospitalization, Sharkey was released from the hospital but did not go back to work.

On January 14, 1997, he applied for disability benefits to Federal Express' disability insurance carrier, the John Hancock Insurance Company ("John Hancock").

In January 1997, he also filed a workers' compensation claim with Alexsis, Inc., ("Alexsis"), Federal Express' workers' compensation insurance carrier. On January 27, 1997, Alexsis denied the claim on the grounds that Sharkey had not submitted reliable evidence that he had sustained a work related injury.[1]

On February 27, 1997, Dr. Santilli completed and returned to John Hancock the physician documentation for the disability claim. On the form, Dr. Santilli stated that, given his medical condition, Sharkey had reached Maximum Medical Improvement (MMI) and could return to

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[1] Plaintiff's attorney referenced an "Exhibit A" as proof that Sharkey prevailed before a workers' compensation judge. However, this exhibit is not part of the papers before this court. (Sharkey Resp. at 1.) Bayne testified that the outcome of the workers' compensation litigation was that only "the day of the event was covered." (Bayne Dep. December 13, 1999 at 10.)

From the evidence submitted on the subject it is apparent that the issues of job relatedness and return to full duties were debatable, requiring the exercise of fact-finding judgment. Alexsis, on behalf of Federal Express, attempted to dispute in that forum Sharkey's claim of job disability. Sharkey undertook to prove that he was permanently disabled from doing the courier job as configured.

Federal Express presented medical testimony through Dr. Kleiman that Sharkey's complaints were not related to the January 3, 1997 activities or to his workload but were consistent with underlying modest coronary heart disease. (Pl.'s Exs. in Supp. of Mot. for Recons. Ex. E at 5.) Dr. Kleiman's report differed from that of Dr. Santilli who opined that Sharkey suffered some heart damage, however small, as a result of the January 3, 1997 work activities. (Id. Ex. G at 2.) Dr. Kleiman concluded that the objective medical findings and clinical history were consistent with a full return of Sharkey to his job at Federal Express. For example, he opined that Sharkey could lift seventy-five pounds, even assuming Dr. Santilli's characterization of minimal heart damage was correct. (Id. at 5-6.) The hospital stress tests completed after the enzyme elevation episodes were all consistent with Sharkey's previous excellent stress test history. (Id. at 4.) However, Dr. Kleiman could not quantify the relationship of stress and time pressures perceived and related by Sharkey as being excessive, to Sharkey's symptoms. His report conceded that "anxiety and stress related to time pressure and work goals can certainly raise blood pressure and heart rate and lower one's threshold for angina." (Id. at 5-6.)

work but could not perform any function that would involve lifting a load greater than fifty pounds. This certified that Sharkey had a permanent lifting restriction.

On March 3, 1997, S. Colin Bayne ("Bayne"), Federal Express' Disability Benefits Manager, wrote Sharkey a letter. In it, he concluded, based on the doctor's restriction, that Sharkey was permanently disabled from performing the essential functions of the courier/NON-DOT job because it required lifting of loads up to seventy-five pounds. Bayne advised Sharkey about Federal Express' Medical Leave of Absence Policy P1-5 ("P1-5") with respect to employees who have reached MMI status.

Under that policy, employees who are released to return to work after a medical leave of absence or disability leave, are characterized as having either no restrictions or only temporary limitations, or as having permanent restrictions and having reached MMI status. The MMI classification may restrict an employee permanently from performing the essential functions of the prior position. (Def.'s Mot. for Summ. J. Exs. F, G table 4.) Once an employee reaches MMI status, the written P1-5 policy provides that the employee has ninety days to attempt to find another Federal Express job within his medical limitation. The employee may submit unlimited Job Change Applications (JCATS) for positions where the employee can perform the requirements of the job. The employee is entitled to placement preference for any lateral or lower position for which the employee qualifies and completes the application process. Failure to find or obtain such a position results in termination.[2]

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[2] The P1-5 policy directs managers to follow different procedures depending upon whether an employee is temporarily disabled and is expected to be able to resume the essential functions of the Federal Express position from which he is on leave as opposed to the situation where an employee has been medically certified as permanently disabled. If an employee is only temporarily disabled, there is no established time constraint to finding a job while on leave. If

Sharkey received a letter outlining this P1-5 policy and how it applied to his situation; specifically, that he had ninety days to secure a job for which he was qualified or he would be terminated. (Def.'s Mot. for Summ. J. Exs. F.) On March 9, 1997, Sharkey returned Bayne's March 3, 1997 letter signed on a pre-designated line acknowledging receipt. He indicated on a pre-printed response portion of the letter that he was unwilling to relocate geographically for a job within his medical restrictions. (Id.)

Between March 11, 1997 and June 3, 1997, on a weekly basis, Bayne mailed to Sharkey a list of jobs available in the immediate area. During this period, Bayne and Sharkey met eight to ten times to discuss various job opportunities. Over the course of those meetings, Sharkey inquired about four jobs but never submitted a written application for any position. (Sharkey Dep. at 101.) He asked about several truck driver jobs, including tractor driver jobs. Bayne told Sharkey that his fifty pound lifting restriction disqualified him from all truck driver positions. He inquired about a dispatcher job. (Id. at 102-04.) He was told that job had to be assigned to an employee who had greater seniority. He later inquired about a part-time customer service agent job. However, his disability payments, which were based on full-time pay status, would have ceased upon accepting any part-time employment. (Id.) Sharkey chose not to apply because he did not want to risk losing his disability benefits. (Id.) Sharkey also attempted to qualify for several clerical positions by taking a typing test. Due to a lack of skill, he scored a "0" on the

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such an employee is released to work, the employee may have to go to a different location but the employee will still have a job. (Bayne Dep. December 2, 1999 at 118-19; Def.'s Mot. For Summ. J. Ex. G table 4.) In addition, the P1-5 policy allows employees, who have been released by their physician to return to work but are temporarily unable to perform the full range of duties, to return to a temporary assignment. (Def.'s Mot. For Summ. J. Ex. G at 3.) This limited capacity position does not apply to permanently disabled employees who have reached MMI and will not be able to resume their prior positions.

test. He never applied for these jobs.

As of June 3, 1997, Sharkey had failed to apply for any position for which he was medically qualified during the ninety day leave period. Federal Express' Human Capital Management Committee ("HCMC") advised Bayne that the P1-5 policy required that Sharkey be terminated. (Def.'s Mot. For Summ. J. Ex. I.) The HCMC noted that Sharkey's unwillingness to relocate geographically had limited potential job opportunities. On June 6, 1997, Bayne sent Sharkey a letter advising him that, based on the HCMC letter, he was being terminated.

Sharkey was fifty-two years old at the time.[3]

On June 10, 1997, Sharkey challenged the termination under Federal Express' Guaranteed Fair Treatment Procedure Policy. On June 20, 1997, Thomas Lynch, Managing Director of the Liberty District, affirmed the decision to terminate. On June 23, 1997, Sharkey appealed Lynch's decision. On July 1, 1997, Lynch's decision was affirmed by Federal Express' Vice President for the Southern Region, Scott Bunker. Sharkey appealed Bunker's decision to Federal Express' Appeals Board in Memphis, Tennessee. The Appeals Board upheld the termination decision.

After exhausting Federal Express' internal appeals process, Sharkey filed a Charge of Discrimination with the Equal Employment Opportunity Committee (the "EEOC") on November 18, 1997 alleging discrimination under both the ADA and the ADEA. He charged that Federal Express had a duty to find work for him consistent with his fifty pound lifting restriction and that

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[3] As evidence of uniform application of the P1-5 policy, Federal Express presented evidence that between January 1, 1996 and January 22, 1997, pursuant to the P1-5 policy, Federal Express had terminated seven employees with ages ranging from thirty-one to forty-seven. (Additional Docs. in Supp. of Summ. J. Ex. B.) However, the P1-5 policy governs various types of leave and not all of these persons have been represented to be MMI status employees.

it had failed to do so. On April 3, 1998, the EEOC sent Sharkey a Notice of Dismissal and Right to Sue.

Sharkey filed this action on June 30, 1998. On January 10, 2000, Federal Express filed a Motion for Summary Judgment on all of the claims.[4]

DISCUSSION

Statement of Jurisdiction

This court has federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331 as this case arises under the laws of the United States. The court also exercises supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. The parties agree that Pennsylvania law governs the disposition of the state law claims.

Analysis

Rule 56 of the Federal Rules of Civil Procedure provides that a court should grant summary judgment "...if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56.[5]

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[4] Through what this court later characterized as excusable inadvertence, Sharkey did not respond to Federal Express' motion. On February 29, 2000, summary judgment was granted in favor of Federal Express. Sharkey filed a Motion for Reconsideration on March 3, 2000. On March 30, 2000, the court granted Sharkey's Motion for Reconsideration and vacated the February 29, 2000 Order. After oral argument on April 18, 2000, Sharkey was given an opportunity to conduct discovery that he urged was essential to a fair determination of a dispositive motion.

[5] No distinction is made between the claims under federal and Pennsylvania law in disposition of this motion as the standards are the same for purposes of determining summary judgment motions. See Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 409 (3d Cir. 1999).

To survive defendant's motion for summary judgment, a plaintiff must establish that there is a genuine issue of material fact by coming forward with "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56 (e) quoted in Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Summary judgment should be directed "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Howell v. Sam's Club, 959 F. Supp. 260, 263 (E.D. Pa. 1997) (quoting Celotex v. Catrett, 477 U.S. 317, 322 (1986)).

"On summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." Matsushita, 475 U.S. at 587-588. A court should give credence to the evidence favoring the non-movant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached..." Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2110 (2000). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions and not those of a judge. Id.

I. The ADA Claim Fails As A Matter of Law, There Being No Genuine Disputed Issue of Fact.

The ADA and PHRA claims will be analyzed under the same rubric. Generally, although they are not bound to, Pennsylvania courts interpret the PHRA in accord with its federal counterparts, which include the ADA. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 979 n.1 (3d Cir. 1996). This is done because there is substantial similarity between the definition of "handicap or disability" under the PHRA and the definition of "disability" under the ADA.

Kelley v. Drexel Univ., 94 F.3d 103, 105 (3d Cir. 1996).

Under the ADA, employers are prohibited from discriminating "against a qualified individual with a disability because of the disability of such individual [with] regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (a). The ADA defines the term "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2). A "major life activity" includes "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Bragdon v. Abbott, 524 U.S. 624, 638-39 (1998) (quoting 45 C.F.R. § 84.3(j)(2)(ii); 28 C.F.R. § 41.31(2)(ii)). "Substantially limits" means "[u]nable to perform a major life activity that the average person in the general population can perform," or alternatively, "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 782-83 (3d Cir. 1998) (quoting 29 C.F.R. § 1630.2(j)(1)(i)-(ii)).

A plaintiff has the initial burden of establishing a prima facie case of unlawful discrimination. There are four elements that a plaintiff has to establish for a prima facie case under the ADA: (1) he belongs to a protected class, i.e., that he is disabled; (2) he was qualified for the position; (3) he was dismissed despite being qualified; and (4) he was ultimately replaced by a person sufficiently outside the protected class to create an inference of discrimination.

Howell, 959 F. Supp at 263 (quoting Lawrence v. Nat'l Westminster Bank New Jersey, 98 F.3d 61, 68 (3d Cir. 1996)).

The third circuit has outlined a two-step analysis to determine whether an individual is substantially limited in one or more of the major life activities and thus disabled for purposes of the ADA. See Mondzelewski, 162 F.3d at 783. First, a court must determine whether the individual is substantially limited in any major life activity other than working, such as walking, seeing, or hearing. Id. (citing 29 C.F.R. § 1630.2(i)). If the court finds that the individual is not substantially limited with respect to any other major life activity, the court's next step is to determine whether the individual is substantially limited in the major life activity of working. Mondzelewski, 162 F.3d at 784.

Sharkey asserts that, because he is substantially limited from performing activities such as "...cut[ting] his lawn, wash[ing] [his] car, fly[ing] a plane, scuba diving, [and] play[ing] racquetball," he is disabled under the ADA. (Sharkey's Resp. at 25.) The above mentioned activities differ significantly in character from functions listed as examples of major life activities in the EEOC regulations.[6] Those regulations state that major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning..." 29 C.F.R. § 1630.2(i). Even though caring for oneself is a major life activity, the third circuit has joined other circuits and stated that "performing housework other than basic chores" does not qualify as a major life activity. Marinelli v. City of Erie, 216 F.3d 354, 363 (3d Cir. 2000). Cutting a lawn and washing a car are akin to house work and are not

[6] 42 U.S.C. § 12116 empowers the EEOC to promulgate regulations implementing the ADA.

major life activities. See Marinelli, 216 F.3d at 363 (quoting Webber v. Strippitt, Inc., 186 F.3d 907, 914 (8th Cir. 1999)). Thus, there is no issue of triable fact as to whether Sharkey is substantially limited in any major life activity.

Sharkey claims to be "disabled" in the major life activity of "working" within the meaning of the ADA because of the twenty-five pound carrying and fifty pound lifting restriction imposed upon him by Dr. Santilli subsequent to his January 3, 1997 chest pain. To be substantially limited in the major life activity of working, a plaintiff must be precluded from employment in a class of jobs rather than just a particular job. 29 C.F.R. § 1630.2(j)(3)(i). The proper inquiry is whether the plaintiff is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. Id. Sharkey has not presented any evidence detailing any class of jobs from which he is excluded; that is, the number and types of jobs utilizing similar training, knowledge, skills or abilities within his geographical area from which he is disqualified because of impairment. Howell, 959 F. Supp. at 267. Indeed, he offers that he could do his prior job if it were modified to his lifting restriction.

Federal Express argues that Sharkey's twenty-five to fifty pound lifting restriction is insufficient as a matter of law to constitute a disability under the ADA. While other circuits have held that a lifting restriction does not constitute a substantial limitation on working,[7] the third

[7] Other circuits have held that a lifting restriction does not constitute a substantial limitation on any major life activity. See Thompson v. Holy Family Hosp., 121 F.3d 537, 540 (9th Cir. 1997) (declaring that employee's inability to lift more than twenty-five pounds not "substantially limiting"); Ray v. Glidden Co., 85 F.3d 227, 229 (5th Cir. 1996) (concluding where plaintiff could lift and reach as long as he avoided heavy lifting, he was not substantially impaired). Courts of this district have determined that a lifting restriction of twenty-five pounds

circuit requires an individualized assessment of the personal characteristics of the plaintiff in conjunction with the lifting restriction to determine if a plaintiff is disabled for purposes of the ADA. See Mondzelewski, 162 F.3d at 784. The third circuit held in Mondzelewski that a district court must determine if a specific lifting restriction, coupled with a plaintiff's education, training, and skills, substantially limits his particular ability to work. 162 F.3d at 784-85. Mondzelewski, a fifty-five year old meat cutter at a chain supermarket, had claimed his employer had discriminated against him by not providing an accommodation to compensate for his lifting restriction. Like Sharkey, Mondzelewski, had a fifty pound lifting restriction and a twenty-five pound carrying restriction. Mondzelewski had a sixth-grade education and worked at the same place for thirty-five years. Mondzelewski, 162 F.3d at 780.

The third circuit reversed the district court's grant of summary judgment in favor of the employer which had determined that Mondelewski did not have a disability. The third circuit pointed out that the ADA regulations require a court to consider the individual's training, skills, and abilities in order to evaluate "whether the particular impairment constitutes for the particular person a significant barrier to employment." Mondzelewski, 162 F.3d at 784 (quoting Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996)).

Here, Sharkey has presented no evidence that his lifting restriction, coupled with his skills and abilities, is a significant barrier to employment. Conversely, he has presented evidence of numerous jobs that he could perform at Federal Express and in the work force in general.

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or more is not a substantial limitation. Panzullo v. Modell's Pa., Inc., 968 F. Supp. 1022, 1024 (E.D. Pa. 1997) (holding that "[n]either a general weightlifting or light-duty work limitation nor a restriction against performing heavy work per se constitutes a disability under the ADA").

Intracorp, which completed a vocational assessment of Sharkey and analyzed "his residual functional capabilities, work history, and transferable skills," listed the following vocational alternatives: chauffeur, dispatcher, messenger, cashier, teller, and customer service coordinator. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 9 at 7.)

While Sharkey has produced evidence that he is unable to perform the particular job of Federal Express courier--his job of choice--he has not presented evidence that he is precluded from employment in a class of jobs, as required under the ADA. "If jobs utilizing an individual's skills... are available, one is not precluded from a substantial class of jobs." Sutton v. United Airlines, Inc., 527 U.S. 471, 491-92 (1999).

As discussed supra, the ADA defines the term "disability" to include a record of a substantial impairment or being regarded as having such an impairment. 42 U.S.C. § 12102(2). The court rejects Sharkey's assertion that Federal Express "regarded" him as being substantially limited in his ability to work. (Sharkey Resp. 22-23.) A plaintiff must demonstrate "a history of, or [be] mis-classified as having, a mental or physical impairment that substantially limits one or more major life activity." 29 C.F.R. § 1630.2(k). Sharkey has presented no evidence of a record of such an impairment. The third circuit has held that the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that perception caused the adverse employment action. Kelley, 94 F.3d at 109. Sharkey has presented no evidence that Federal Express regarded him as being disabled.

While Bayne did state at his deposition that he "assumed" Sharkey qualified under the ADA, his explanation of that assumption shows that the statement cannot be read as regarding Sharkey as being disabled within the ADA definition. (Bayne Dep. December 13, 1999 at 83.)

Bayne stated that he treated Sharkey as an employee with permanent restrictions and dealt "with him in regard to his abilities, not his disabilities at the time, and what he couldn't and could do." (Id.) While it is true that Federal Express regarded Sharkey as unable to perform the functions for the particular job of courier, with the seventy-five pound lifting requirement, Sharkey has presented no evidence that Federal Express regarded him as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes..." 29 C.F.R. § 1630.2 (j)(3)(i). Indeed, Federal Express, through Bayne, sent job opportunities to Sharkey on a weekly basis and suggested alternative jobs, evidencing belief that he was able to work. Therefore, no reasonable jury could find Sharkey disabled under any prong of the ADA definition.

Since Sharkey cannot establish that he is disabled under the ADA, the court need not examine the other factors required for establishing a prima facie case of discrimination under the ADA.

II Sharkey Cannot Show That His Termination Was Retaliatory.

The Pennsylvania Supreme Court has recognized a cause of action where an employee alleges he was fired for pursuing a worker's compensation claim. See Shick v. Shirey, 552 Pa. 590, 603-04 (1998) (holding that because there is a compelling public policy in favor of protecting an employee who has filed a workers' compensation claim, such an employee should be protected from retaliatory termination). A plaintiff must at least proffer affirmative evidence of retaliation to defeat a defendant's motion for summary judgment. See Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989). Therefore, in order to survive summary judgment, Sharkey is required to present evidence that he was retaliated against in some discernible way for filing his workers' compensation claim.

Retaliation claims under the comparable framework of Title VII are subject to the burden-shifting framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000). Under this burden-shifting methodology, the plaintiff must first establish a prima facie case of retaliation. Id. If a plaintiff is successful in establishing a prima facie case, the burden then shifts to the defendant-employer, who must articulate a legitimate, non-discriminatory reason for the prohibited conduct. Id. If the employer carries this burden of production, the plaintiff must then persuade the court by a preponderance of the evidence that the employer's reason is pretextual. Id.

To make a prima facie case of retaliation, a plaintiff must show that there was: (1) protected activity; (2) an adverse employment action; and (3) a causal relationship between the protected activity and the adverse employment action. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). Sharkey has failed to establish a prima facie case of retaliation. He cannot establish that there is a causal connection between his filing a worker's compensation claim and his termination.

In support of his claim of retaliation, Sharkey offers the following theory: (1) Sharkey filed a workers' compensation claim; (2) as soon as Bayne learned of the claim, he started keeping a log of his conversations with Sharkey; (3) Bayne harbored feelings of resentment towards Sharkey arising from a prior incident involving the two men; (4) when Sharkey filed his workers' compensation claim, Bayne, as Human Capital Management Program Manager, was supposed to help Sharkey find another position; (5) Sharkey did not find a job for

which he was qualified because of Bayne's lack of help; and (6) Sharkey was terminated.[8]

Sharkey has established that he did engage in the protected activity of filing a workers' compensation claim, and that he was terminated at a point in time subsequent to the filing of the claim. However, he has not demonstrated that there was a causal connection between the two events. Sharkey cannot simply rely upon the fact that an adverse employment action occurred after he filed his workers' compensation claim. That is insufficient to satisfy a plaintiff's burden of demonstrating a causal link between the two events. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997). Nor can one draw an inference from the mere fact that Federal Express opposed Sharkey's workers' compensation claim, that it challenged the claim in bad faith. An employer has a right to contest a claim and to require that the claim be proven by requisite evidentiary proofs and standards.

There is no contention, nor could there be, that Federal Express' defense to the workers' compensation claim could be characterized as bad faith as a matter of law. There was admissible medical evidence that Sharkey's coronary heart disease was not aggravated by the work he was doing on January 3, 1997. The record shows that Dr. Kleiman concluded, after examining Sharkey and reviewing all relevant medical records, that Sharkey's complaints on January 3, 1997 were not related to his lifting regiment and that his coronary heart disease and symptoms were caused by genetic factors. (Pl.'s Exs. in Supp. of Mot. for Recons. Ex. E at 5.)

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[8] Sharkey also alleges as evidence of retaliation, without offering any legal support for this claim, that Federal Express was required to report his injury and immediately start a workers' compensation claim for him. Without reaching whether or not Federal Express had a duty to report the injury or make a claim, it is clear that Federal Express had a medical basis to contest the claim that his angina was work-related. (**Pl.'s Exs. in Supp. of Mot. for Recons. Ex. E.**)

Further, plaintiff's factual theory of causation fails because Sharkey offers no evidence that Bayne had any involvement at all in Federal Express' decision in regard to the workers' compensation defense. Sharkey asserts that Bayne's efforts to have him fired began on the very same date that Bayne learned that he had filed a workers' compensation claim. Sharkey also asserts that within eight days of his finding out that Sharkey had filed the claim, Bayne started efforts to declare Sharkey MMI. (Sharkey Dep. at 2.) The evidence is that it was Dr. Santilli, Sharkey's doctor, who determined that he had reached MMI and not Bayne. (Def.'s Mot. For Summ. J. Exs. B.)

Sharkey points out that Bayne kept a log on his conversations with him and instructed one of his employees to follow up with Dr. Santilli on the medical opinion that Sharkey had reached MMI. (Exs. in Supp. of Pl.'s Resp. to Mot. for Summ. J. Ex. 8.) There is nothing unlawful about the keeping of a log or notes by a supervisor or for follow-up with a doctor whose opinion may determine the employee's job placement. These are all expectable aspects of supervision. There is no evidence that information recorded or obtained through these methods was materially inaccurate, false, or used unlawfully in the termination action. Moreover, Sharkey has not presented any evidence to rebut Bayne's statements that he kept a log on all employees who went on leave and that, given the doctor's reports indicating Sharkey had permanent restrictions, he sought information about whether Sharkey had reached MMI so that he could inform him of his workplace options at the earliest possible date. (Bayne Dep. December 2, 1999 at 40, 49.)

Finally, there is no evidence that Bayne had anything to do with the actions of Alexsis, Federal Express' insurance company, denying the workers' compensation claim and contesting that claim in the workers' compensation forum. Bayne stated in his deposition that he did not

review workers' compensation claims. (Bayne Dep. December 2, 1999 at 86.) This is not rebutted.

Sharkey has offered no evidence that Bayne made the recommendation for his termination. Bayne explained that his job was to oversee Federal Express Leave of Absence policy for the Liberty District, (Bayne Dep. December 2, 1999 at 31-32), and that his duties were to help an employee through the leave of absence process and to make sure that the employee was properly compensated and understood those responsibilities dictated by the nature of the leave of absence. (Id.) The evidence shows that Bayne accurately advised Sharkey of the P1-5 policy and that when Sharkey did not find a job within his physical limitations within ninety days, Sharkey reported that fact to the appropriate committee, which had the authority to make the termination decision. Finally, the evidence shows only that Bayne relayed to Sharkey the decision of the Human Capital Management Committee (HCMC) to terminate him pursuant to the P1-5 policy. (Def.'s Mot. For Summ. J. Exs. I.)

Nevertheless, Sharkey advances the theory that but for Bayne's animus towards him, he would have been placed in a job within Federal Express within his physical requirements and that he would have not been subject to termination under P1-5.[9] As such, the matter boils down to deciding whether 1) Sharkey has made out a prima facie case that there existed a job for which he

[9] Sharkey asserts without foundation that Bayne never should have supervised him because this violates Federal Express' policy that a prior manager cannot supervise an employee who was involved in the manager's demotion. Federal Express' demotion policy states that demoted managers may not be assigned to a position that would result in their being a peer of their former subordinates without the approval of the Personnel Services director. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 23.) This policy would not have applied to Bayne since he was not Sharkey's work supervisor.

was qualified and for which he made a written application and 2) whether he has proffered any evidence that could reasonably rebut Federal Express' articulated reason that his termination was through uniform application of the P1-5 policy.

Sharkey has failed to show that a permanent job existed at Federal Express within his physical restrictions and for which he applied. As discussed supra, Sharkey inquired about four jobs but never submitted a written application for any position. There is no contention that he did not understand that he had to make a written application.

He asked Bayne about several truck driver jobs, including tractor driver jobs. The fifty pound lifting restriction disqualified him from those truck driver positions. Sharkey inquired about a dispatcher job. That job had to be assigned to an employee who had greater seniority. He later inquired about a part-time customer service agent job but chose not to apply for the position in order to keep his full-time disability entitlements. Sharkey attempted to qualify for several clerical positions by taking a typing test, but he scored a "0" on the test. He never applied for these jobs.

Thus, Sharkey has presented no evidence that jobs existed whose job description matched his lifting restrictions and for which he made written application. Therefore, the allegation of personal animus by Bayne has no relevancy, even if it existed. There is no objective evidence of any age bias or animus of any kind in Bayne's assistance of Sharkey during the critical ninety day period.[10]

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[10] Nevertheless, because it appears to be so much a part of Sharkey's assertions, some further discussion is appropriate to reflect that there is no proof from which a reasonable fact finder could infer actionable personal animus on the part of Bayne. Sharkey asserts that such animus could be inferred from the fact that he filed a March 31, 1992 written complaint against

Sharkey has failed to present evidence to rebut Federal Express' articulated reason for termination as uniform application of the P1-5 policy. Sharkey has proffered a log which lists employees on leave of absence and the number of days that they have been out. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 25.) Sharkey claims that because there are employees on the list who have been on leave for more than ninety days and who have not been terminated defendant's articulated reason is pretextual. Sharkey's allegation is not supported by the evidence. He fails to observe that the termination policy applies only to employees who have been certified as having reached their medical maximum recovery and who cannot find a job within their restrictions. The list only shows how long employees have been out on leave of absence irrespective of reason, i.e., medical, family, or personal. (Bayne Dep. December 13, 1999 at 77-78.) It is not a list of employees who have reached their medical maximum recovery.

Bayne that Sharkey asserts led to Bayne's demotion. Sharkey did write the Managing Director of the Liberty District complaining that Bayne, then the Senior Station Manager, had not taken appropriate action when Sharkey had verbally complained to him, that Guy Bowens, Sharkey's Operations' Manager, favored employees based on their race. (Sharkey Resp. at 2.) Sharkey has submitted a copy of the letter and Federal Express' acknowledgment of the letter. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Exs. 11, 12.)

Sharkey now speculates that this letter must have caused Bayne's demotion. Federal Express' records show otherwise. They show that Federal Express was already concerned about Bayne's management ability in the middle of March 1992 and that his department was under review well before Sharkey's March 31 letter. Concerns had been noted relative to leadership, the lack cleanliness of vehicles and the front counter, lack of support given to the "dangerous-goods" staff members, and failure to visit the night operation regularly. (Id. Ex. 13.) On March 27, Bayne received a performance review that identified five areas as being unsatisfactory.

In April, other station employees requested that the Managing Director of the Liberty District meet with them to discuss their complaints about Bayne which included (a) Bayne's allowing subordinate supervisors to intimidate employees and general lack of accountability of managers and (b) the lack of dependable schedules for employees.

There is no evidence that the March 31 letter was ever made known to Bayne by Federal Express and no evidence that, assuming it had been, Bayne ever exhibited any hostility or blame towards Sharkey.

It includes employees who, though injured, have not yet presented themselves as ready to return to work.

Sharkey asserts, contrary to the record evidence, that the P1-5 policy was not uniformly administered because two other employees remained couriers even with permanent lifting restrictions below seventy-five pounds. He alleges that Barry Epling had a permanent back injury from an automobile accident and returned to full-time work as a courier with a zero lifting restriction. However, in his deposition, Epling stated that he had no lifting restriction at all when he returned full-time as a courier and that he was never certified as having reached MMI. (Epling Dep. at 20.) Epling explained that for ninety days while recovering from a car accident he worked in a limited capacity at Federal Express with a ten pound lifting restriction, but was then released to full duty with no lifting restriction and returned to his previous route. (Id.) Nine months after assuming his prior route, he applied for the job of PC processor within Federal Express. (Id. at 21.) Epling's situation is factually inapposite and not supportive of Sharkey's claim.

Sharkey asserts that Barry Reich sustained a back injury that prevented him from bending and lifting, and yet remained a courier. He alleges that Reich only had to drive and his manager rode along and actually did the delivering. (Sharkey Resp. at 5.) Reich testified in his deposition that with regard to his injury he was never certified by his doctor as having reached MMI or as having a permanent medical restriction. He testified that during his recovery from back sprain he came back to work, was on light duty work for a short period of time and that during that period his manager did ride with him and did deliver packages. However, he left work again because of his back. During that absence, he completed his recovery. When he came back to work, he

returned to full courier duties without restriction. (Reich Dep. at 25, 34-35.)[11] Reich's situation is inapposite and not supportive of Sharkey's claim.

Sharkey asserts that the Federal Express P1-5 policy requires that the company, through its relevant committee, "find a job, structure a job..." for an employee who has permanent restrictions and cannot complete the essential functions of his or her previous job.[12] (Sharkey Resp. at 29.) However, this interpretation of the P1-5 policy is not supported by any of the relevant manuals and policies. (Def.'s Mot. For Summ. J. Exs. F, G.) Federal Express' manual does promise that a permanently disabled employee will receive placement preference for any lateral or lower level position for which the employee completes the selection process and for which the employee is qualified, (Def.'s Mot. for Summ. J. Exs. F), and that the Human Capital Management Committee (HCMC) will assist employees with their return to work and make concurrent efforts with those of the employee to find available jobs. (Id.) The manual does not promise that such employees will be placed in jobs for which they are not qualified. Sharkey relies upon a letter from Tom Lynch, Managing Director of the Liberty District of Federal Express, for the assertion that Federal Express has an obligation to find permanently disabled

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[11] Throughout his Response, Sharkey alleges that Federal Express participated in witness tampering because witnesses gave different statements than he expected. However, there is no evidence that any witness ever gave an oral statement to Sharkey or to his attorney that was contrary to the deposition testimony.

[12] Sharkey alleges, without evidence, that the job of PC processor was created for Barry Epling as a light duty job because of his permanent back injury. However, the evidence shows thatEpling returned as a full duty courier to his previous route on March 18, 1994. Over one year later, April 14, 1995, he applied for and received the PC processor job, following an interview process, discussed supra. (Additional Docs in Supp. of Summ. J. Ex. G.) Colleen Martin's deposition shows that other employees, including herself, could have applied for the position that Epling received. (Martin Dep. at 17.)

employees alternative jobs. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 17B at ¶ 6.) That letter describes a situation where the HCMC offered an employee an available job even though the employee had taken no initiative to apply for any positions himself. The Lynch letter cites this an example of the efforts Federal Express will make in order to help an employee. (Id.) However, the letter cannot be read reasonably as an undertaking by Federal express to assign an employee to a job permanently who is not physically qualified to perform it on a permanent basis.

Finally, as an additional attempted proof of a causal connection between filing the worker's compensation claim and his termination, Sharkey asserts that in October 1995, when he had suffered a prior angina attack and was out for ninety days on Short Term Disability but did not file a worker's compensation claim, Federal Express did not instruct him to find a new job. Rather than being evidence of Federal Express retaliating against him for filing a worker's compensation claim, this action by Federal Express evidences uniform application of the P1-5 policy. In 1995 Sharkey was never medically certified as having a permanent disability that limited his ability to do his courier job upon his anticipated return to work.

III. Sharkey Fails to Survive Summary Judgment on his ADEA Claim.

Sharkey maintains that he was fired by Federal Express in violation of the ADEA which states that it is "unlawful for an employer...to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A plaintiff may establish discrimination through circumstantial evidence using the burden shifting analysis originally set forth in McDonnell Douglas v. Green, 411 U.S. at 802,

discussed supra. First, plaintiff has to establish all of the elements of a prima facie case of discrimination under the ADEA. This undertaking requires proof that: (i) plaintiff was a member of the class protected by the ADEA ("individuals who are at least 40 years of age," 29 U.S.C. § 631(a)); (ii) plaintiff was discharged; (iii) plaintiff was qualified for the job; and (iv) plaintiff was replaced by a sufficiently younger person to create an inference of job discrimination. Kelley v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d. Cir. 1999); Reeves, 120 S.Ct. at 2106.

Once a plaintiff establishes a prima facie case of discrimination, the burden of production (not the burden of persuasion) shifts to the defendant to produce sufficient evidence to support a finding that the defendant had a legitimate, nondiscriminatory reason for the discharge. Reeves, 120 S.Ct. at 2106. After a defendant meets its burden to present evidence to support a nondiscriminatory explanation for its decision, the burden of production shifts back to plaintiff to proffer evidence from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994); Reeves, 120 S.Ct. at 2106.

The United States Supreme Court has decided the kind and amount of evidence that is required to be presented by a plaintiff claiming that an employer unlawfully discriminated on the basis of age in order to survive a summary judgment motion. See Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000). The Reeves case involved a motion for judgment as a matter of law; however, the Supreme Court stated that because the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, the inquiry for each is the same. Reeves, 120 S.Ct. at 2110 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-

51 (1986)). A plaintiff may satisfy his burden to overcome a motion for summary judgment by establishing a prima facie case of discrimination and by presenting evidence that defendant's proffered explanation is unworthy of belief. Reeves, 120 S.Ct. at 2106; Fuentes, 32 F.3d at 764 (holding that if the plaintiff has pointed to evidence sufficient to discredit the defendant's proffered reasons, to survive summary judgment, the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case).

Even if **Sharkey did present sufficient evidence to establish a prima facie case of discrimination,**[13] **he has not presented sufficient evidence to rebut the employer's articulated non-discriminatory reason for termination or demonstrated that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.** Federal Express has stated that adherence to its P1-5 policy was the basis for Sharkey's termination. Federal Express' policy requires an employee to be terminated when (1) the employee has reached maximum medical improvement and has permanent restrictions that preclude performance of the essential functions of a job and (2) within ninety days of MMI the employee does not find another job at Federal Express within his physical limitations. Federal Express has presented evidence that between January 1, 1996 and January 22, 1997, it terminated seven employees in the Liberty District pursuant to its P1-5 policy which governs various aspects of leave. Each of the seven employee terminated during this time ranged in age from thirty-one to

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[13] In terms of establishing a prima facie case of age discrimination, Sharkey has established that he was over forty and a member of the class protected by the ADEA, discharged, and replaced by a younger person. A **thirty year-old courier, who was already employed by Federal Express at the time that Sharkey was fired, is now covering the route that Sharkey had had. (Krisch at 20.) However,** the medical evidence is clear that Sharkey was not qualified for the job because of the lifting restriction, discussed supra.

forty-seven. (Additional Docs in Supp. of Summ. J. Ex. B.)[14]

Despite Sharkey's assertions that there were courier routes which he was not offered that did not require the lifting of seventy-five pounds such as residential, drop-box, and walking or letter courier routes, the depositions of all couriers show that from time to time, regardless of route, all couriers may have to perform tasks that require lifting seventy-five pounds. (Epling Dep. at 71-72, 74; Reich Dep. at 6-8; O'Connell Dep. at 9-10; Martin Dep. at 14, 27; Pennabaker Dep. at 7, 27-28.)[15] Consistently, the couriers offered examples, similar to that of deponent Reich, who stated that even on a residential route the deliveries could be light one day and then heavier the next and a small percentage of the deliveries weighed seventy-five pounds. (Reich Dep. at 7, 11.) Routes are assigned as the need requires and routes are not job classifications.

Sharkey asserts that he should have been permitted to perform the job of courier even with his twenty-five pound carrying and fifty pound lifting restriction because of Federal Express' safe lifting policy. Under that policy, if a courier believes that lifting a particular box

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[14] Sharkey alleges that Federal Express' failure to follow another policy is some evidence of discriminatory intent against aged and disabled employees. (Sharkey Resp. at 15.) Sharkey alleges, without factual support, that Federal Express failed to follow its Termination Policy which requires an exit interview and termination pay. (Id.) However, that policy states that the "procedures set forth in this manual provide guidelines for management and employees during employment, but do not create contractual rights regarding termination or otherwise." (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 22.) Furthermore, it is undisputed that Sharkey did receive a lump sum disability settlement and went through all the available levels of appeal. (Def.'s Mot. for Summ. J. Exs. R.)

[15] While Abbe Forman testified that the foot courier route consisted mainly of envelopes and small packages weighing less than five pounds, she admitted that there was a seventy-five pound lifting requirement for the position. (Forman Dep. at 16-17, 24.) Therefore, as part of her job it was expected she could deliver a seventy-five pound package.

will result in injury, the courier has to seek assistance or can be held at fault if injured. (O'Connell Dep. at 12-14; Colleen Martin Dep. at 10-11.) However, the evidence shows that that policy is premised on the requirement that couriers are expected to be able to lift seventy-five pounds and that assistance will be sought only in isolated instances, primarily involving packages that weigh in excess of seventy-five pounds or are of a difficult shape to maneuver. (Id; Additional Docs. in Supp. of Summ. J. Ex. C, D; Pennabaker Dep. at 8.) William O'Connell, a courier whom Sharkey deposed, testified that the policy of seeking assistance in lifting packages was intended for packages weighing more than one hundred-fifty pounds. He also testified that if a package weighed more than one hundred-fifty pounds, employees had to obtain an exception from Federal Express to lift it by themselves. (O'Connell Dep. at 12.) There is no evidence that contradicts this understanding and application of the policy.

Sharkey also asserts that he could have been a tractor driver, despite the written job classification requirements, because someone other than drivers load the tractors. (Sharkey Dep. at 104-05.) However, the depositions of the tractor driver witnesses all show that prior to the summer of 1997, which is the time period in question, the tractor drivers were classified as couriers/tractor drivers and were solely responsible for loading their tractors. (Carcia Dep. at 17; James Gallagher Dep. at 6-8.) Thereafter, a cargo handler was assigned to each truck. Even then a driver could be required to assist in loading and unloading operations. (Id.) Sharkey has presented no evidence to rebut the evidence that tractor drivers were and are subject to the seventy-five pound lifting requirement.[16]

[16] Furthermore, the assertion of animus with respect to the tractor driver job is undercut by the fact that Bayne gave Sharkey the opportunity to try to obtain medical clearance from Dr.

Sharkey has not provided evidence upon which a fact finder could believe that a discriminatory reason was more likely than not a motivating cause of the employer's action. Fuentes, 32 F.3d at 764. The record is devoid of evidence that Sharkey was a victim of age discrimination. Conversely, Sharkey stated in his deposition that neither Bayne nor any other member of management made any adverse comment to him relative to his age. (Sharkey Dep. 107-08, 141.)[17] Sharkey further stated that during his employment he never felt mistreated by Federal Express Management because of his age. (Id. at 133.)

Sharkey asserts that Joyce Gallagher, an operations' manager at Federal Express, said in a February 1997 meeting that all drivers over the age of forty should look for a new job. This was not a meeting that Sharkey attended. The evidence shows that Gallagher never supervised Sharkey and had no involvement in any decision to terminate him. The employees who did attend the meeting testified that there were no anti-age statements and that Gallagher discussed opportunities that Federal Express provided to its employees so that they would have more options once they reached forty. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 17A; Krisch Dep. at 13; Roth Dep. at 11-12.) Nevertheless, some employees who were not at the meeting started a rumor that the meeting was about the company getting rid of employees over age forty. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 17A; Roth Dep. at 51-

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Santilli, such that he could be a tractor driver. Such clearance was never given. Sharkey stated that his doctor never sent the release because of the seventy-five pound lifting restriction. (Sharkey Dep. at 195-97.)

[17] Sharkey alleged that Guy Bowens once said that it was okay for Sharkey to leave work after unloading his truck because "we know how you old people need your rest." (Sharkey Dep. 108-09.) Sharkey has presented no evidence that Bowens had any involvement in any decision to terminate him.

52). Gallagher in a letter expressed her dismay that those employees had misinterpreted her comments to mean that Federal Express was going to get rid of all drivers over forty. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 17A.) Sharkey's assertion is based on rumor that does not constitute admissible evidence that Gallagher made an anti-age statement in that meeting. Furthermore, a rumor about an isolated statement that was confirmed to be false by employees who attended the meeting, and allegedly made by a person who was not Sharkey's manager and who had no role in his termination, cannot form the basis for inferring that a discriminatory reason was more likely than not a motivating cause of Federal Express' termination action.[18]

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[18] Sharkey asserts the following in support of his claim of discrimination:

1. M. McKay, Sharkey's manager, once told a courier that he may have to look for alternative work within Federal Express because of his injury history and leave of absences over a twelve year period. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 18.) Sharkey claims that this proves that Federal Express "teaches its managers to make these statements...to get rid of the aged and disabled or injured employees." (Sharkey Resp. at 17.) This assertion is irrelevant because there is no evidence that the employee was removed from his courier job. The employee, Marty O'Connor, still works at the Bristol Station. (Bayne Dep. December 13, 1999 at 59.);

2. An upper manager at Federal Express denied that there was discrimination in response to a statement by an employee on a radio talk show alleging that Federal Express discriminates against aged and disabled employees. (Exs. in Supp. of Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 17b). Sharkey claims that this shows that Federal Express has a practice of taking immediate steps to correct a statement that it believes false, so when there was no response by Federal Express to McKay's or Gallagher's statements, this shows that Federal Express "acquiesced and adopted Gallagher's and McKay's statements." (Sharkey Dep. at 18.) This argument does not constitute admissible evidence nor is it supported by the record. This argument and conclusion are also premised on erroneous information and therefore cannot be considered as a supportive response in opposition to a motion for summary judgment.

Conclusion

For the foregoing reasons, the motion for summary judgment by Federal Express is granted and an appropriate order follows.